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DATE FILED: 4/26/10 *gr*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
JOHNNY SANTANA,

Petitioner,

v.

DALE ARTUS,

Respondent.  
-----x

06 Civ. 7774 (BSJ) (MHD)

**Memorandum & Order**

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

Before the Court are the objections of Habeas Petitioner Johnny Santana ("Santana") to the Report and Recommendation ("R&R") of Magistrate Judge Michael H. Dolinger recommending the denial of Santana's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the following reasons, the Court adopts the R&R, overrules Santana's objections, and DENIES the Petition.

**LEGAL STANDARD**

When a magistrate judge has issued findings or recommendations, the district court "may accept, reject, or modify [them] in whole or in part." 28 U.S.C. § 636(b)(1)(C). The Court reviews de novo any portions of a Magistrate Judge's R&R to which a petitioner has stated an objection. See 28 U.S.C. § 636(b)(1)(C); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). "Where no objections are filed . . . the court reviews the report for clear error." Brown v. Ebert, No.

05 Civ. 5579, 2006 WL 3851152, at \*2 (S.D.N.Y. Dec. 29, 2006) (citing Gardine v. McGinnis, No. 04 Civ. 1819, 2006 WL 3775963, at \*4 (S.D.N.Y. Dec. 20, 2006)).

Although Santana "objects in all respects" to the R&R, (Pet'r's Obj. to Rep. and Rec. 7), the Court reviews de novo only those portions of the R&R to which Santana objects specifically. The Court reviews the remainder of the R&R for clear error.

#### **DISCUSSION<sup>1</sup>**

Santana raises two discrete objections to Magistrate Judge Dolinger's R&R, as well as a general objection to the entire R&R. First, he claims that his trial lawyer provided ineffective assistance of counsel because he failed to object to "the trial court coercing the jury into a verdict" and to the trial court's failure to accept a partial verdict or to declare a mistrial. Second, he asserts that these actions or inactions by the trial court denied him due process and a fair trial. With respect to both of these objections, the Court agrees with the conclusions of the R&R. As for Santana's general objection, the Court finds the remainder of the R&R not clearly erroneous.

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<sup>1</sup> The facts and procedural history of this case are set forth in detail in Magistrate Judge Dolinger's Report and Recommendation, familiarity with which is presumed.

### **I. Ineffective Assistance of Counsel**

Santana argues that his trial counsel failed to object to the trial court's purported coercion of the jury and the court's refusal to accept a partial verdict or to declare a mistrial. He asserts that these omissions amounted to ineffective assistance of counsel. According to Santana, "had defense counsel made proper objections to the outrageous events occurring within the jury room during deliberation or, had counsel subsequently filed a CPL § 330.30 motion he would have, 1) protected the record for appellate review in the event of an adverse decision, and 2) provided the trial court an opportunity to address the unusual proceedings giving rise to Juror notes that clearly show the Juror[s] were not focusing on deliberating a [sic] verdict, but rather concerned about the disruption between Juror[s] 1 and 2." (Pet'r's Obj. to Rep. and Rec. 2).

With respect to Santana's claim that his attorney should have filed a CPL § 330.30 motion, the Court agrees with the conclusion of the R&R that this section would not apply because Santana and his counsel were both present during the discussions about conflicts among the jurors and Santana presents no evidence of other improper conduct by a juror that was unknown to him at trial. See N.Y. Crim. Proc. § 330.30(2) (permitting court to set aside or modify verdict if "during the trial there occurred, out of the presence of the court, improper conduct by

a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict") (emphasis added). Thus, the failure of Santana's attorney to file a CPL § 330.30 motion cannot constitute constitutionally deficient performance. See generally United States v. Regalado, 518 F.3d 143, 149 n.3 (2d Cir. 2008) ("[F]ailure to make a meritless argument does not amount to ineffective assistance." (quotation marks omitted)).

As for Santana's claim that his trial counsel was ineffective because he failed to object to "the trial court coercing the jury into a verdict" and to the court's failure either to accept a partial verdict or to declare a mistrial, the Court agrees with the conclusion of the R&R that trial counsel's performance was not deficient. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Santana's attorney made numerous objections throughout the trial, noted these objections for the record, and made two applications for a mistrial on other issues. (Tr. 830-31, 898-99, 1426, 1833-34, 1851). Moreover, Santana's attorney (and Santana himself)<sup>2</sup> participated fully in the multiple discussions that occurred pertaining to the conflicts between the jurors, (Tr. 990-91, 1419, 1453, 1679-81,

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<sup>2</sup> During deliberations, Santana addressed the Court, saying that "it seems to me this is what trial is. There is [sic] disagreements . . . but they just have to come together and render some kind of verdict." (Tr. 1789).

1787-89, 1812, 1861-62), and so there is no indication that counsel neglected this issue. The Court agrees with the conclusion of the R&R that these actions by counsel during the trial plainly do not amount to the "oversight, carelessness, ineptitude or laziness" required to meet the performance prong under Strickland. See Eze v. Senkowski, 321 F.3d 110, 112 (2d Cir. 2003).

For these reasons, Santana has failed to present any evidence that overcomes the presumption that his attorney exercised reasonable professional judgment in all relevant respects. See Strickland, 466 U.S. at 690 ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). Moreover, even if Santana could show that trial counsel's performance was deficient, Santana cannot show prejudice: if these claims had been preserved for appeal the Appellate Division would have rejected them. See People v. Santana, 16 A.D.3d 346, 347, 792 N.Y.S.2d 71, 73 (1st Dep't 2005) (declining to review Santana's unpreserved claims but stating "[w]ere we to review these claims, we would reject them"); United States v. Habbas, 527 F.3d 266, 274 (2d Cir. 2008) (finding no prejudice where counsel's failure to object "made no difference" to the outcome).

Therefore, the Court overrules Santana's objection to the conclusion of the R&R that Santana's counsel did not provide ineffective assistance of counsel.

## **II. Due Process and Right to a Fair Trial**

Next, Santana asserts that his rights to due process and a fair trial were violated when the trial court "coerc[ed] a verdict from the jury," failed to accept a partial verdict or declare a mistrial, and gave a defective Allen charge. (Pet'r's Obj. to Rep. and Rec. 3-4); Allen v. United States, 164 U.S. 492 (1896). Santana points to the altercation between Juror One and Juror Two as evidence that "the Jurors were clearly not concentrating on deliberations." (Id. at 5). In addition, Santana argues that the trial court coerced the jury into a guilty verdict because although the jury had been deliberating over counts 6 and 11 through 17 for five days, it then reached a verdict less than an hour after the Court returned the jury to deliberations on those counts. (Id.)

The Court agrees with the R&R's conclusion that these claims are procedurally barred from habeas review because the First Department explicitly (and correctly) determined that Santana's claims were unpreserved. See Santana, 16 A.D.3d at 347. This is an independent and adequate state law ground, see Coleman v. Thompson, 501 U.S. 722, 729 (1991), as New York's



contemporaneous-objection rule embodied in N.Y. Crim. Proc. Law § 470.05(2) is recognized by federal courts as a settled and legitimate requirement under New York law. See, e.g., Garcia v. Lewis, 188 F.3d 71, 78-79 (2d Cir. 1999) ("[W]e have observed and deferred to New York's consistent application of its contemporaneous objection rules.").

Santana responds that he can demonstrate "cause for the [procedural] default and actual prejudice as a result of the alleged violation of federal law, or . . . that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. Santana argues that his counsel was ineffective in failing to contemporaneously object to the continuation of jury deliberations. See Murray v. Carrier, 477 U.S. 478, 488 (1986). But as discussed, Santana cannot show ineffective assistance of counsel. Nor does Santana point to "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule," such as "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." Id. (internal citations and quotation marks omitted). And for the reasons stated in the R&R, Santana cannot show that a failure to address these claims here would result in a fundamental miscarriage of justice. (Rep. and Rec. 39). Therefore, the

Court overrules Santana's objection to the conclusion of the R&R that his jury-related claims are procedurally barred from habeas review.

Finally, the R&R concluded that even if the jury-related claims were not procedurally barred, the result would be the same because Santana's arguments lack merit. The Court agrees with and adopts the R&R's detailed and well-reasoned conclusions that the trial court did not err in failing to accept a partial verdict or in failing to declare a mistrial and in providing an allegedly defective Allen charge. (Rep. and Rec. 40-52).

### **III. General Objections**

Finally, Santana "objects in all respects" to the R&R. (Pet'r's Obj. to Rep. and Rec. 7). As discussed above, except for the portions of the R&R to which Santana objects specifically, the Court reviews the R&R for clear error. Having done so, the Court finds Magistrate Judge Dolinger's R&R thorough, well-reasoned and not clearly erroneous. Accordingly, the Court adopts Magistrate Judge Dolinger's recommendation not to issue a writ of habeas corpus on the basis of those claims.

### **CONCLUSION**


For the foregoing reasons, the Court adopts the R&R of Magistrate Judge Dolinger in its entirety and DENIES Santana's



Petition for a Writ of Habeas Corpus. Because Santana has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; see United States v. Perez, 129 F.3d 255, 260 (2d Cir. 1997). Pursuant to 28 U.S.C. § 1915(a)(3), any appeal taken from this order would not be taken in good faith.

The Clerk of the Court is directed to close this case.

**SO ORDERED:**

  
Barbara S. Jones  
UNITED STATES DISTRICT JUDGE

Dated: New York, New York  
April 26, 2010